In the Supreme Court of the United States.

OCTOBER TERM, 1915.

NO. 12, ORIGINAL.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER.

BRIEF FOR THE UNITED STATES IN REPLY TO BRIEF OF RICHARD W. HALE ET AL.

A brief filed in support of the practice in the First Circuit advances one new idea, namely, that the power to bind over to keep the peace justifies indefinite suspension of the execution of a criminal sentence. The contention is indefensible.

The power to require security for keeping the peace is a similar one and is a check on a person who if at large might otherwise endanger the peace of a community. It is commonly exercised by justices of the peace to restrain threatened violence. Its exercise is authorized by statute in probably every State, and it is the very power given to Federal courts by section 727, Revised Statutes. While ordinarily exercised in advance of the commission of crime, it is true that, at the common law, it was sometimes

21378—16

exercised even as late as the imposition of final sentence; and when so exercised it was always in addition to the punishment prescribed by law for the specific crime, and also upon a finding that after the expiration of the prison term the convict might still be a menace to the public peace.

The faculty here assumed *relieves* of punishment altogether because of the alleged *virtues* of the defendant; whereas the power to compel keeping the peace, when exercised at the time of sentence, imposes a *burden* additional to the full regular sentence, and this because of the enduring dangerous impulses of the convict. The common law decisions cited (Hale brief, pp. 14 and 17) demonstrate the distinction just stated.

In *Rex* v. *Hart*, 30 Howard State Trials, 1344, the defendants Hart and White were sentenced for 18 calendar months and for an additional 18 months, and it was provided after the expiration of the term of both these sentences each defendant must give a bond for good behavior for a period of five years commencing at the expiration of the last prison term. The Attorney General said the reason for the bond requirement—

> was to guard against future libellous publications, to protect the public peace against future probable invasions of it; (1337)

while the Lord Chancellor said:

> the crime of which these two persons were convicted was one of the most dangerous description. (1344)

They were convicted of a series of libels against the administration of public justice and the trial by jury in England, and against one of the judges and certain jurors.

Regina v. *Dunn*, 18 L. J. M. C. 41 (the case could not be found under the reference given on p. 15 of the Hale & Grinnell brief), involved a conviction of perjury, by means of which, under pretense of being a creditor, Dunn threw the Baroness Burdett Coutts into bankruptcy. The sentence was that Dunn be imprisoned 18 months and at the expiration of the prison term he give a bond to keep the peace and be of good behavior toward all, and especially toward the Baroness, for a period of 2 years commencing on the expiration of the prison term. A motion to arrest this judgment was interposed on the ground that it might produce perpetual imprisonment. It was held that in cases of *misdemeanors* the Queen's Bench might require security to keep the peace.

In *Rex* v. *Draper*, 30 How. State Trials, 1129, it appears that Col. Draper's motion for a new trial was denied November 10, 1807, and he was required to appear for the sentence when the court should order. On November 13 the cause was moved for judgment upon the 18th instant. On the latter date defendant appeared for judgment with elaborate affidavit showing. The Attorney General requested time to produce a counteraffidavit and the cause was ordered to stand over for that purpose until November 23, when the defendant appeared and was

sentenced to $500 fine and three months' imprisonment, and because of the "obstinate persistency in the libels" to give, at the expiration of the term of imprisonment, a bond of $2,500 to behave well for a period of two years thereafter.

In *Queen* v. *Richardson*, 8 Dow. Pr. 511, plea of guilty was tendered upon the express condition precedent that defendant should be released on his own recognizance and never called for sentence if he discontinued the libels. The plea thus conditioned was accepted. The right of the court to take such a plea was not challenged. It was insisted, and the court held, that until the condition was breached defendant could not be taken for imprisonment under that plea.

The State decisions referred to in the brief may be similarly distinguished.

In *Commonwealth* v. *Duane*, 1 Binney's Refs. 98, the defendant before preliminary examination in the Mayor's Court on the charge of publishing numerous libels, refused to give a peace bond. On habeas corpus the court upheld him, saying that the peace-keeping power did not apply to such a case, and further saying that the power was meant to protect against those "supposed to be dangerous to the community."

In *United States* v. *Greiner*, 4 Phila. 403, the question was, could a United States Commissioner, on a preliminary hearing upon a treason charge, bind the accused over to appear in the State of Georgia for trial when, because of its secession, no speedy trial

in United States courts could be there given him. It was determined that he could not be constitutionally bound over, whereupon the court proceeded independently of the specific criminal charge and under section 727, Revised Statutes, and on account of his apparent violent purposes, bound him over to keep the peace.

In *Estes* v. *State*, 2 Humph. (Tenn.) 498, it was held that a single act of gaming, unaccompanied with circumstances of aggravation, was not such a misdemeanor as would authorize binding the defendant to keep the peace, and in this case the defendant plead guilty to the indictment for gaming and was fined therefor. The court characterizes the peace-keeping power as "preventive justice" and distinguishes it from "punishing justice." This distinction is concluded in Tennessee by the case of *Spencer* v. *State* (1911), 125 Tenn. 75, wherein, in speaking of suspension of execution of sentence, the court said:

> It can not be stayed merely for the purpose of enabling the trial judge to hold the sentence *in terrorem* over the head of the prisoner to secure future good behavior.

(See our Original Brief, p. 27, and Reply Brief, pp. 9–10.)

Reading section 727 in parallel with section 722, R. S., it becomes apparent that the power bestowed by the former was never intended to neutralize the execution of sentence as contemplated in the latter.

(Sec. 722, R. S., is quoted in our Original Brief, p. 12.)

The reference to Highmore relates only to bail and is wholly unrelated to this question.

No other authorities are cited in the attempt to apply the peace-keeping power.

Additional common-law authorities are cited (Hale brief, 12–13) as in support of the power to indefinitely suspend execution.

In *Rex* v. *Bishop*, 1 Strange 9, the defendant was brought up in due season for judgment on the verdict, when the language quoted (in the brief, p. 11) was employed. The report of the case shows that he was in such a condition as that he died within a few days thereafter. It is evident that the court was of the opinion that the shock attending the imposition at that time of an adequate sentence would have endangered his life, and the postponement was but temporary to overcome that condition. It was such a postponement as would have normally occurred in the due administration of justice if physicians had ordered the defendant into a hospital between verdict and appearance for sentence.

In *Burgess* v. *Boetefeur*, 7 Manning & Granger, 481, while the indictment was returned at a session beginning October, 1842, it does not appear that it was returned in that month, and neither the duration of the court session nor the date of the plea to the indictment is shown. The postponement was

merely to accomplish another judicial action—*i. e.*, the abatement of the disorderly house (the maintenance of which formed the subject of the indictment); and as soon as the house was abated the sentence was imposed. No question as to power of postponement was raised. The suit was a *qui tam* action to recover an amount said to be due under a statute from those who were overseers at the time of the "conviction," and the court held that the defendant was not convicted until he had been sentenced.

In this connection we quote the language of this court in its opinion in *United States* v. *Mayer*, 235 U. S., 55, 70:

> In a Federal court of competent jurisdiction final judgment of conviction had been entered and sentence had been imposed. The judgment was subject to review in the appellate court, but so far as the trial court was concerned it was a finality; the subsequent proceeding was, in effect, a new proceeding which by reason of its character invoked an authority not possessed.

It is urged that a decision that the practice is unconstitutional will prevent parole and probation laws. We have shown in our Reply Brief that no such result could possibly ensue. In thus claiming the power as of kin to parole and probation he thereby opposes the views expressed in some parts of the other briefs filed for respondent. If it be a phase of parole or probation, it can not be a phase of the peace-keeping power; nor could its exercise be unconstitu-

tional unless parole and probation were themselves a phase of the pardon power. This contention therefore, confuses all distinction between pardon, parole, peace-keeping and suspension of execution powers, and includes them all in the same family.

If, as stated (Hale & Grinnell brief, pp. 24–25), there be in Massachusetts alone 200 convicted persons who have never responded to the law's demand, though never lawfully forgiven for their misdeeds, each of these persons has been long owing service of sentence to the State, and every convict now confined in jail has as much right to be at large as they. Their good fortune should not prevent the administration of the law.

Whatever the rule in Massachusetts as to mandamus to compel the imposition of sentence (Hale & Grinnell brief, p. 8), this court has determined that this remedy will lie not only in case of refusal to administer the law, but in case of negligent delay in the administration thereof. *Ex parte Crane*, 5 Pet. 190, 192; *ex parte Bradley*, 7 Wall, 364, 375. (Our brief in support of petition for mandamus, p. 9.)

We are not concerned with the Massachusetts practice in the State courts. In *United States* v. *Mayer*, *supra*, this court quoted approvingly from *Bronson* v. *Schulten* 104 U. S. 410, as follows:

> And this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts. (69)

The Federal courts must all alike have or be denied this faculty. The practice in any single State can not control.

In speaking of the Massachusetts practice it is said that the court keeps control of the cause by declining to make an entry in its records of the acceptance of a plea of guilty, or the adoption of a like verdict. *Acceptance* is not essential to the validity of a plea of guilty, or of any other plea than "*nolo contendere.*"

The other matters have been already covered in the original and reply brief for the Government.

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JANUARY, 1916.

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INDEX.

	Page.
STATEMENT	2
A. Difference between the case at bar and the First-Circuit practice	2
B. Description of First-Circuit practice	3
ARGUMENT	6
General.	
I. The object is laudable	6
II. It is one proper to be sought through the exercise of the judicial power	6
III. It is not unconstitutional as executive power	8
IV. It needs no statute if it is "common ground"	11
V. Text-books and additional precedents indicate that it is historically sound	12
VI. It is the same in substance as the common-law power to bind to "good behavior"	14
Local.	
VII. It is supported by local practice	18
VIII. There are local precedents of general weight	20
Consequences.	
IX. Consequences of a decision against the practice	24
X. *Conclusion.*	25

TABLE OF CASES AND AUTHORITIES CITED.

Burgess *v.* Boetefeur, 7 Man. & Gr. 481, at 484	13n
Capital Traction Co. *v.* Hof, 174 U.S. 1, at 13–16	7

Page.

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Commonwealth *v.* Dowdican's Bail, 115 Mass. 133 — 18, 22, 23

Commonwealth *v.* Duane, 1 Binney, 98n; (s.c.) 1 Hall, A.L.J. 168 — 26n

Commonwealth *v.* Foster, 122 Mass. 317, at 323 — 8

Commonwealth *v.* Hayes, 170 Mass. 16 — 8

Commonwealth *v.* Macey (unreported) — 18

Commonwealth *v.* Maloney, 145 Mass. 205, at 211 — 22

Commonwealth *v.* O'Brien, 175 Mass. 37, at 39–41 — 8

Commonwealth *v.* Miller Snell, "Columbian Centinel," Boston, January 14, 1832 — 19

Commonwealth *v.* Weymouth, 2 Allen, 144 — 8

Estes *v.* State, 2 Humph. (Tenn.) 496, at 498 — 26n

Hurtado *v.* California, 110 U.S. 516, at 528–530 — 12

Keith *v.* McCaffery, 145 Mass. 18, at page 19 — 8

Marks *v.* Wentworth, 199 Mass. 44, 45 — 22

Murray's Lessee *v.* Hoboken Land &c. Co., 18 How. 272 — 12

Noyes *v.* Manning, 159 Mass. 446, at 447 — 8

Queen *v.* Richardson, 8 Dow. Pr. 511 — 16n

Regina *v.* Dunn, 10 Ad. & El. 1026, 1041 — 15

Rex *v.* Bishop, 1 Strange, 9 — 13

Rex *v.* Draper, 30 How. State Trials, at 1129 — 15n

Rex *v.* Hart, 30 How. State Trials, 1344 — 15

Rex *v.* Lady Alice Lisle, 11 How. State Trials, at 375 — 10

	Page.
Rex *v.* Wandsworth, 1 B. & Ald. 63	11n
Rinado *v.* Lummus, 205 Mass. 155, at foot p. 156	8
United States *v.* Greener, 4 Phila. 396, at 403	26n
United States *v.* Linnier, 125 Fed. 83, at 85–87	8
United States *v.* Mayer, 235 U.S. 55, at 70	18
United States *v.* Margaret Mulhall, on June 2, 1914 (unreported)	4
United States *v.* Midwest Oil Co., 236 U.S. 459, at 472	17
Burnett, Bishop, Life and Death of Sir Matthew Hale, pp. 30, 31	9
Burns' Justice, Ladd's Abridgment, Dover, N.H. (1792) pp. 400–412	14
Chitty, Criminal Law (2d ed.), vol. 1, p. 716 (1826)	12
Chitty, Criminal Law (2d ed.), vol. 1, c. 15	12
Chitty, Criminal Law (2d ed.), vol. 1, c. 16	12
Chitty, Criminal Law (2d ed.), vol. 1, c. 2, p. 701	13
Chitty, Criminal Law (2d ed.), vol. 1, pp. 696, 697	11n
Dalton's Country Justice (edition of 1746), p. 288	15
Dalton's Country Justice (edition of 1690), p. 124	15
Davis's Criminal Justice (F. F. Heard's edition of 1853), at page 240	17
Hale, Sir Matthew, Life and Death of, by Bishop Burnett, pp. 30, 31	9
Highmore on Bail (1791), 179–185	13
Massachusetts Probation Manual, Preface	6
Massachusetts Probation Commission, Sixth Annual Report (1914), p. 17	6

Page.

Pound, Roscoe, "Justice According to Law," 13 Columbia Law Review, 696, and 14 Columbia Law Review, 1 and 103 12

Report of Commissioners on the Revised Statutes of Massachusetts (1835), part IV, tit. III, note to chapter 143, p. 84 16

STATUTES.

14 Henry VI, c. 1 11n

U.S. Rev. Sts., sec. 727 14

New Federal Code, sec. 270 14

Massachusetts St. 1865, c. 223 23

Massachusetts St. 1869, c. 415, sec. 60 24

Supreme Court of the United States.

October Term, 1915.

No. 12, Original.

EX PARTE THE UNITED STATES.

BRIEF IN SUPPORT OF THE PRACTICE IN THE FIRST CIRCUIT.

This brief is arranged as follows:

STATEMENT.

A. Difference between case at bar and First-Circuit practice.

B. Description of First-Circuit practice.

ARGUMENT.

General.

I. The object is laudable.

II. It is one proper to be sought through the exercise of the judicial power.

III. It is not unconstitutional as executive power.

IV. It needs no statute if it is "common ground."

V. Text-books and additional precedents indicate that it is historically sound.

VI. It is the same in substance as the common-law power to bind to "good behavior."

Local.

VII. It is supported by local practice.

VIII. There are local precedents of general weight.

Consequences.

IX. Consequences of a decision against the practice.

X. *Conclusion.*

Statement of the Case.

A. Difference between Case at Bar and First-Circuit Practice.

In the case at bar, *United States* v. *Killits*, there is called in question a criminal judgment or sentence entered by the District Court for the Northern District of Ohio, coupled with an order suspending its execution. The contention of the Government is that the record is separable into two parts, and the latter part void. The order represents the practice of the Northern District of Ohio.

The practice in the First Circuit is as follows:

After a plea of guilty, or a verdict of guilty, the Court does not enter any judgment or sentence. It postpones the cause and admits the defendant to bail.

The object in both cases is to create a probationary period during which the Court can become wiser before deciding whether and with what severity to execute a sentence. In both cases the ultimate purpose is to make the punishment suffered by the offender as suitable as possible to the offense. This involves not only making the punishment suitable to the offender, but also suitable in its effect as a deterrent power. But while the purpose is the same the practice is substantially different from that in Northern District of Ohio. We do not concede that our practice is to stand or fall with the decision of this case, but we feel and submit that the real issue ought to be the object, and not

merely the Ohio practice. Hence this brief is filed to make sure that both the object and the practice in our Circuit shall stand or fall after the Court has had as much light upon the general situation as is possible.

B. Description of First-Circuit Practice.

In the First Circuit, in the Federal Courts, the practice in the various districts is substantially uniform. It is also substantially in accordance with that part of the practice in the state courts which exists at the common law, independent of statute.

We shall first briefly describe the practice in the First Circuit. Or rather, as the other Districts are comparatively free from Federal crime, we shall describe the practice in the Massachusetts District as fairly typical.

In this Court cases often occur in which the judge believes that neither an immediate prison sentence nor an immediate fine — which often amounts to a short prison sentence — is in the best interest of the United States. In these cases a plea or verdict of guilty is taken and recorded, but no entry is made accepting or adopting that plea or verdict in any way, and the case is continued without any judgment; that is to say, without sentence. The case being continued, the defendant is admitted to bail. In suitable cases he is required to furnish sureties, but generally the bail are not persons whose pecuniary responsibility is important. They are chosen for their fitness to have that custody of the offender which common-law bail always have, and they are chosen as persons who are likely to be able, in consequence of such custody or supervision, to give intelligent information about the offender. It

is hoped that their influence will cause some amelioration of his behavior.

Until the actual sentence the Court never makes any final decision as to whether it will sentence at all; and if so, as to whether the punishment shall be fine or imprisonment, minimum or maximum. These functions, which require the highest judicial capacity and power, are not finally exercised. Should mandamus be brought to stop the practice in Massachusetts, it would, for the reasons above indicated, be mandamus to require the exercise of these functions at a particular time.

The Assistant United States Attorneys for the District, and other persons connected with prosecutions, have been generous in giving their time in such cases. Helpful reports are secured from them. Voluntary service is also gratefully received from the probation officers of the Superior Court for Suffolk County, Massachusetts, and from other people with similar training. There have been cases of unusually young defendants, and, in these, persons connected with the Juvenile Court of the City of Boston have also freely given important and voluntary service. In every case which arose before the present case began, the proceedings have had the assent of the United States Attorney.

This has been the practice of the United States District Judge and his predecessors in office for at least sixty years; and until the present discussion no question has ever been raised as to its legality. In the case of *United States* v. *Margaret Mulhall*, on June 2, 1914, the United States Attorney for the District stated in open court that the Attorney General of the United States requested the exercise of the power to suspend judgment and sentence.

The only doubt which has ever been expressed has been upon the question of whether there was a right to continue a case for sentence if the District Attorney should move that sentence be imposed. This doubt was expressed upon the question of what was the common law of the subject; that is to say, the law common to both state and Federal Courts. As will appear by a later citation, the doubt has been resolved in the state criminal trial court, and it is the established practice of the state, independent of statute, that the District Attorney is not entitled to insist upon sentence. But as the United States Attorney for the Massachusetts District has usually been content with the views of the trial judges upon the question of the time and amount of punishment, the question has not arisen in the Federal Courts. The practice has rather indicated that the United States Attorney considered it to be a duty of his office not to move for sentence if he thought that the imposition of sentence was not in the true interest of the United States.

In the Massachusetts District the indictment of defendants under twenty years of age by the United States grand jury is not an uncommon thing. In one case within the last three years the defendant was under sixteen years of age. In another case a gang of boys between sixteen and nineteen years were indicted for the larceny of brass to a small amount from a shipment of goods moving in interstate commerce. Some of the boys were living at home, had no previous criminal record of any kind, and were plainly led into the crime in question by older boys and bad associates. The District Judge in the particular case was satisfied that a fine would amount to a jail sentence and that any

sentence in jail would be reasonably certain to ruin some of the boys.

Argument.

I. The Object is Laudable.

In the preface to the Massachusetts Probation Manual, edition of 1914, it is said:

> "Massachusetts has been called the 'home of probation' . . . The practice antedates the statutes . . . The statutes have indeed been chiefly the record of an accomplished idea."

In Sixth Annual Report of Massachusetts Commission on Probation (1914), at page 17, the system is described:

> "The probation service deals with human material that has not been stamped as criminal. It undertakes to build out of this a respect for law and correct personal conduct before the difficulty of that task has been heightened by penal experience."

The value of probation is scarcely matter which needs argument to this Bench.

II. The Object is Proper to be Sought through the Exercise of the Judicial Functions.

We do not understand that the Attorney General denies this or asserts that either probation or parole established by statute would be void as giving to courts executive power.

It is well established that trial by jury, to which every criminal defendant, as well as the parties to a

civil action, is entitled, is not a trial merely by twelve men. It is a trial in which the court has an integral function to give judgment.

Capital Traction Co. v. *Hof*, 174 U.S. 1, at 13–16.

The verdict of the jury is not the judgment of the court. It may be set aside. Even in a criminal case it requires exercise of the judicial power to make it effective.

What are the requirements for the particular exercise of this power? The judge knows that, if exercised to its full length, it sends the defendant to jail. Now if the defendant is entitled to a pardon, as, for instance, an informer, the judge knows that it is a breach of his duty to enter a sentence. Except in the rare cases where only one penalty, or punishment, can be inflicted, the judge knows that he must exercise the judicial power and the judicial mind in determining what the sentence shall be. In some cases the judge knows that he ought to allow time to arrange a pardon. The judge knows that it is his duty to inform himself with regard to the character of each prisoner, and also with regard to the question of what deterrent effect the punishment of the particular prisoner will have upon the community as a whole.

The object of judgment in a criminal cause is sometimes analyzed by saying that sentences are (*a*) partly for punishment; (*b*) partly in the hope of reforming the particular criminal; and (*c*) imposed in order to deter others from committing the same or similar crimes.

And we submit that the mere statement of the conditions surrounding the function of imposing a sentence

conclusively proves that both whether and when to exercise it are discretionary questions of judicial power and jurisdiction requiring a high order of discretion, and that mandamus will not lie to compel the exercise of this power at a particular time.

See *Rinado* v. *Lummus*, 205 Mass. 155, at the foot of page 156, to the point that it is the sentence which is the judgment. Also —

Com. v. *Weymouth*, 2 Allen, 144.
Com. v. *Hayes*, 170 Mass. 16.
Com. v. *Foster*, 122 Mass. 317, at page 323.
Keith v. *McCaffery*, 145 Mass. 18, at page 19.
Noyes v. *Manning*, 159 Mass. 446, at 447.
Com. v. *O'Brien*, 175 Mass. 37, at pages 39–41.

The relative functions of the district attorney and the court in these matters are discussed by Judge MacPherson in —

United States v. *Linnier*, 125 Fed. 83, at pages 85–87.

III. The Executive Power Does Not Exclude Such a Judicial Function.

"Reprieve," we say, is not a word which is broad enough to cut down the judicial power as a matter of constitutional necessity. Should the contrary be true, it would necessarily follow that the courts must declare unconstitutional the entire body of statutory law throughout the country which creates and develops the modern system of probation, suspended sentence, and

indeterminate sentence. While the question would technically arise under clauses of the state constitutions, those clauses ought to be interpreted in the same sense as the Federal Constitution.

The principal briefs discuss the historical question of whether at the common law a discretionary reprieve was exclusively the function of the king. On this subject we venture to touch very briefly. The main question before the court for decision being with reference to the exercise of the judicial power at the present day, we think it would be unfortunate to attach much weight to the notorious subordination of the judiciary to the prerogative which existed before 1688. Yet the various books — such as "Pleas of the Crown" — which are cited upon the subject reflect strongly that view of the prerogative. To our minds the lesson of that period is quite different from what it is sought to prove by such quotations. Take, for instance, Bishop Burnett's account, in his "The Life and Death of Sir Matthew Hale," of the way the author of Hale's "Pleas of the Crown" behaved on the bench. The biographer gives, as an illustration of Lord HALE'S "justice and courage" (pp. 30, 31), that when he was acting as a judge, in the time of Cromwell, a soldier was found guilty of murder —

> "and though Colonel Whaley that Commanded the Garrison, came into the Court and urged, that the Man was killed only for disobeying the Protectors Orders, and that the Souldier was but doing his Duty; yet the Judge regarded both his Reasons and Threatnings very little; and therefore he not only gave Sentence against him, but ordered the

> Execution to be so suddenly done, that it might not be possible to procure a Reprieve, which he believed would have been obtained, if there had been time enough granted for it."

This seems to us worth half a dozen early cases or text-books.

In the same way we think there is light to be thrown by history upon the suggestion of the Attorney General that the judges used to exercise the executive power to grant discretionary reprieves by delegation from the sovereign. There is authority to that effect, but is it not of the very worst sort?

The infamous Lord JEFFREYS said, in the trial of Lady Alice Lisle:

> "Look you, Mrs. Lisle, when I left His Majesty he was pleased to remit the time of all executions to me; that wherever I found any obstinacy or impenitence, I might order the executions with what speed I should think best; therefore, Mr. Sheriff, take notice you are to prepare for this execution of this gentlewoman this afternoon."
>
> 11 How. State Trials, 375.

This is the trial of which Parliament later declared that the verdict had been —

> "extorted and procured by the menaces and violences and other illegal practices of George, Lord Jeffreys."

The trouble with this sort of precedent is that it was wiped out in 1688. Of course, that is a common fact

of history which need scarcely be cited, but it is worth mentioning because of the conclusion which may fairly be drawn from the history of that time.

We submit that in the Declaration of Right of 1689, upon which the Bill of Rights was founded, the grievances of the community were listed. There is nothing there or in history to indicate that constitutional liberty required any limitation upon reprieves by judges. The power of the King to dispense was to fall. His power to pardon and reprieve remained. But no one thought there was any occasion to condemn a judge's power to hasten or postpone sentence, and the actors of that time probably knew the story about Hale.[1]

IV. Common Ground.

There is necessarily common ground between the executive and the judicial power. We say that such practice as that in Massachusetts is either exclusively judicial in its character or falls within this common ground. We submit, therefore, that any well-established practice of long standing for the exercise of power by judges is proper, independent of statute. We go further and assert that any reasonable exercise of the judicial power to determine when, and to what

[1] Until 14 Henry VI, c. 1, Justices of Assize could only receive the verdict. It was for the Court in Banc to give sentence.

Chitty, Cr. Law (2d ed.), vol. I, 696, 697.

At one time an ingenious device for getting highways repaired seems to have depended on a discretionary power to suspend sentence, for, after verdict of acquittal, and before judgment thereon, they used to try the issue again in another indictment.

Rex v. *Wandsworth*, 1 B. & Ald. 63.

extent, it will impose its judgment or sentence is proper, even in jurisdictions where it may be novel.

For the principle involved in dealing with the question of common ground, see —

Murray's Lessee v. *Hoboken Land &c. Co.*, 18 How. 272.

Hurtado v. *California*, 110 U.S. 516, at pages 528–530.

Roscoe Pound's "Justice According to Law," 13 Columbia Law Review, 696, and 14 Columbia Law Review, 1 and 103 (reprinted in pamphlet form).

V. Text-Book and Other Citations Not in Principal Briefs.

There are a few additional cases, and some text-books, which show how this power was exercised, instead of discussing its existence. We think they may be helpful, for common practice, as stated in books prepared for easy reference by the bench and bar, is quite as significant about this sort of thing as any reported cases.

See Chitty, Criminal Law (2d ed.), vol. I, p. 716 (1826).

Chitty contains the following chapters, which are instructive as to the extent of the judicial function:

Chapter 15, "Of the Proceedings between Verdict and Judgment."

Chapter 16, "Of the Judgment and its Incidents."

From these chapters various aspects of the power of suspending judgment appear, and in the second chapter

referred to there is a classification as follows, on page 701:

> "Judgments against defendant, are either by express sentence, or without any such sentence" —

and on page 716 various offenses are mentioned which—

> "May require the utmost severity which the Courts are empowered to exert, as their moral turpitude exceeds that of many capital offences; while there are others on the contrary for which the most trifling fine is an adequate penalty. In all these cases the practice of compelling the offender to find securities for his good behavior has prevailed and has been found of the highest benefit. It is indeed one of the most salutary instances in which our laws are directed to the prevention of crimes, which is at all times so much better than their punishment."

In *Rex* v. *Bishop*, 1 Strange, 9 (1717), defendant . . . appearing to be in a very ill state of health, PARKER, C.J., said:

> "The offence is so great that an adequate punishment may endanger his life, and to lessen the judgment would be an ill precedent; therefore bail him for the present and we will give judgment when he is better."

For "life" substitute "character," and you have the case for probation.[1]

See also Highmore on Bail (1791), 179–185.

[1] In *Burgess* v. *Boetefeur*, 7 Man. & Gr. 481 (1844), the plaintiff had informed against one Mitchell and others for keeping a bad house and

VI. Good Behavior.

All Courts exercising common-law jurisdiction have a common-law power to hold to security for good behavior. This power is secured to the Federal Courts by section 727 of the Revised Statutes, to be found in its re-enacted form in the New Federal Code, sec. 270. Upon the question of whether the practice in question is lawful or not, we deem the existence of this common-law power most material. And if the power to seek good behavior as an end by something other than a sentence of a fine or imprisonment is a common-law power in judges, substantially all constitutional difficulties disappear.

The common-law power is unquestioned. It is what the old manuals call the power to secure good behavior or "good abearing." For instance, Burns' Justice, which we purposely cite, in the Dover, New Hampshire, Abridgment by Eliphalet Ladd, of 1792 (pp. 400, 412), shows the existence of the power and its use at common law both in England and America. A reference is there found to the following passage in Dalton:

"I lately granted the good behavior against one

sued the Overseers of the Poor for the statutory amount due him for securing conviction. It appeared that indictments were prepared against Mitchell and others and they severally pleaded guilty in October, 1842.

"The judgment was respited that the nuisances might in the meantime be abated; and this having been done, the parties were afterwards (in June, 1843) brought up for judgment, when they were each fined 1*s.* and discharged." See page 484.

Meanwhile the overseers were changed, and the question was: Which overseers were liable for the money?

Held, by TINDAL, C.J., COLTMAN & CRESSWELL, JJ., that the conviction was not complete till judgment entered in June, 1843, so that the later overseers were held liable.

for that he had bought Ratsbane and mingled the same with Corn and then wilfully and maliciously did cast the same among his Neighbors Fowls, whereby most of them died . . . And since I have known it allowed as a good Cause by the Judges of Assise."

Dalton's Country Justice (edition of 1746), p. 288.

The same passage appears in the earlier edition of Dalton of 1690. These two folio editions were presented to the Social Law Library in Boston by Hon. Charles Jackson, an associate justice of the Supreme Court of Massachusetts from 1813 to 1823, and the edition of 1690 contains the book-plate of Francis Dana, chief justice of Massachusetts from 1791 to 1806.

The power is not limited to breaches of the peace. Two leading cases establish this. The first is —

Rex v. *Hart*, 30 How. State Trials, p. 1344.

In this case MANSFIELD, C.J., speaking for the judges of England, told the House of Lords that the power existed at the common law, and was not limited to breaches of the peace.[1] The crime under consideration there, however, was perhaps one tending to cause a breach of the peace. The doubt raised by that point is resolved by —

Regina v. *Dunn*, 10 Ad. & El. 1026, at 1041.

[1] As evidence that this power to hold to good behavior and future sentence was a perfectly common thing, we may say that we turned back by accident from the first page of the report of *Rex* v. *Hart* to the last page of the preceding report (*Rex* v. *Draper*, 30 How. State Trials, at 1129) and found the following:

"Lord ELLENBOROUGH: Col. Draper should enter into his own

In this case the celebrated Lord WENSLEYDALE, then Baron PARKE, held that the power existed at common law and was applicable to an indictment for perjury in making a false oath in bankruptcy proceedings against Angela Burdett-Coutts.

The following passage appears in the report of Charles Jackson, Asahel Stearns, and John Pickering, commissioners on the Revised Statutes of Massachusetts in 1835, part IV, tit. III, note to chapter 143, p. 84, in praise of this power:

> "When such sureties can be obtained it can hardly fail to operate as a powerful check upon the conduct of the party who is thus put upon his good behavior. And if his character and habits are such that no one will consent to be sponsor for him it must forcibly impress on his mind the value of a good character, while it deprives him of just complaint of the severity of the law or the magistrate."

The form of the recognizance in common use is interesting, since one who should merely turn over the textbooks might contend that the power was limited to cases where there was no previous conviction or to the

recognizance, with that of two other sureties, to come up, if called upon by the Court to receive judgment for that part of the libel which is contained in this indictment, and in the mean time to be of good behavior."

The judgment in this case reads:

"The defendant being present here in court, and being, by his own default, convicted of certain misdemeanors . . . he the said defendant gives security . . . for his personal appearance in this court whenever he shall be thereto required by this Court, in order to receive the sentence of this Court in this prosecution, and in the mean time to be of good behavior." Cf. *Queen* v. *Richardson*, 8 Dow. Pr. 511.

period after a sentence had been served. It exists before and after conviction. The common form recites conviction or plea.

In Davis's Criminal Justice (F. F. Heard's edition of 1853), an American book in wide and common use, the form for this recognizance is given at page 240. We condense it, without troubling the Court with marks of omission:

> "Whereas . . . is brought before said court on complaint charging him with . . . , and said . . . having plead that he was guilty
>
> "Now then if the said . . . shall be of good behavior toward all the people of said Commonwealth for the term of . . . months," etc.

Since, as was said in —

> *United States* v. *Midwest Oil Co.*, 236 U.S. 459, at 472 —
>
> "Government is a practical affair intended for practical men. Both officers, law makers, and citizens naturally adjust themselves to any long continued action . . . on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice" —

and since —

> "this principle is recognized in every jurisdiction" —

the idea that Courts have not the power to seek good behavior by proceedings other than sentences would seem to lack all historical foundation.

VII. Local Practice.

The case in the Massachusetts Superior Court referred to in the statement of facts above is *Commonwealth* v. *Macey*, a prosecution for statutory rape, tried to a jury in the Superior Court for Bristol County, Massachusetts. The defendant was convicted by the jury, and the Assistant District Attorney for the District moved for sentence, and insisted upon his motion. Counsel for the offender opposed this upon the ground that it would be unjust to sentence the defendant at all, having in mind the facts of the particular case. Mr. Justice BELL, of the Massachusetts Superior Court, denied the motion and ordered the case continued. No sentence has ever been imposed upon Macey.

(The correct view of this province of the District Attorney has recently been stated by this Court as follows:

> "The consent of the prosecuting attorney could not alter the case; he was not a dispensing power to give or withhold jurisdiction."
>
> Per HUGHES, J., *United States* v. *Mayer*, 235 U.S. 55, at 70.)

The brief of the late Hon. Charles R. Train, Attorney General for the Commonwealth, in *Com.* v. *Dowdican's Bail*, 115 Mass. 133, contained the following statement:

> "It has been a not uncommon practice in the Criminal Courts in this Commonwealth, after verdict, in minor offences, or where there were extenuating circumstances, or where questions of law upon similar questions were pending before this or some other court, to delay passing sentence, and

order the case to be laid on file. It has always been considered that the effect of such an order was simply to suspend passing of sentence, leaving it in the power of the court at any time, when the reasons which induced the delay no longer existed, to take the case from the files and have it proceed to judgment. The defendant in all cases where sentence was thus delayed on account of extenuating circumstances was put on his good behavior and under bonds, as it were, to live honestly."

Mr. Train was a man of large experience. The brief quoted is in the Social Law Library in Boston.

From *Com.* v. *Miller Snell*, reported in "Columbian Centinel," published in Boston, January 14, 1832, it appears that, when passing sentence on a boy for attempt to kill by poisoning, THACHER, J., said:

"The object of all punishment, by a human tribunal, is twofold — to act upon the offender and to bring him, if possible, to a better mind; and to deter others by his sufferings from committing a like offence. . . .

"I wish that I could impute it to accident, to want of discretion, to anything rather than to malice; but not only the verdict of the jury, but the circumstances of the case, convince me that the defendant perpetrated this deed with such deliberate malice as that he is a suitable object of punishment.

"*I have striven to find such circumstances of mitigation as would authorize me to suspend the sentence*, and to consent to send the defendant to

the House of Reformation for Juvenile Offenders. But that house was not prepared for such an offender as this. . . . [It was a private charity.]

"If he should be sent to that place it would not, I fear, be regarded by the community, and especially by the young, as a punishment. To send him home to his friends, without punishment, would be a great reflection on the justice of the law."

VIII. Local Precedents.

There are local precedents which have weight in themselves besides proving local practice.

Commonwealth v. *Chase*, Thacher's Criminal Cases, p. 267:

This case was also differently reported in 1 Law Reporter, 163 (1839), Peleg W. Chandler, editor — with a note that "the principles of the above decision have often been recognized in Boston."

The case is a Massachusetts precedent of considerable importance which has escaped the notice of counsel in the principal briefs. It decides that the power to suspend sentence exists at the common law. The importance of the case is increased by a footnote (at page 270) which records that a petition for certiorari was brought to reverse Judge THACHER'S decision; that upon a hearing of this appeal Chief Justice LEMUEL SHAW delivered an opinion sustaining Judge THACHER, in which the other judges of the court were understood to concur. These other judges were SAMUEL PUTNAM, SAMUEL S. WILDE, and MARCUS MORTON.

We have made diligent search for any written opinion or report without any success.

We believe from papers we have found that Mr. Justice STORY received, on its publication in 1839, and read, the number of the Law Reporter containing the report of this case. He was then associate justice of this Court for the First Circuit.

The case arose in the old Municipal Court of Boston, in which Judge PETER OXENBRIDGE THACHER sat for twenty years, from 1823 to 1843. He was one of the most respected *nisi prius* judges in the early part of the nineteenth century, and, as stated in the preface to the volume of Criminal Cases, "was distinguished for his earnest study and thorough knowledge of the criminal law and its practical application."

This case is recorded in volume XIX of the Records of the old Municipal Court of Boston, at page 199. The offense was stealing from a dwelling. The material part of the record is:

> "And now at the May term, A.D. eighteen hundred and thirty-one Jerusha Chase is brought up for sentence under an indictment found against her at the January term A.D. eighteen hundred and thirty of this Court: Said Jerusha having recognized, at the February term A.D. eighteen hundred and thirty to come when sent for and in the meantime to keep the peace. And said indictment is continued until the present July term. And now the Court having seen and considered the petition of said Jerusha setting forth that there is no law, usage, custom, practice, or right known to the laws of the land or in use and force in the administration of Justice, whereby this Court at this term and under the premises and circumstances of this Case, are authorized to pass any additional or other

sentence upon said Jerusha and praying to be discharged from said indictment, do order, that she take nothing by said petition, and now the Court having considered of her offence as set forth in the indictment, do order that she suffer five days solitary imprisonment and afterwards to be confined to hard labour six months."

The petition for certiorari is noted in the docket of the Supreme Judicial Court for Suffolk County at the November term, 1831, where it appears, on page 101, that S. D. Parker was for the petitioner, and the Solicitor General for the Commonwealth. The entry "Petn dismissed" is perhaps in the handwriting of Chief Justice SHAW.

The original indictment against Jerusha Chase was found at the January term, 1830, and is endorsed:

> "Feb. 8. Defendant retracts her plea and pleads guilty and recognized in the sum of two hundred dollars with Benjamin Salmon, trader, and Daniel Chase, Cordwainer of Marblehead, to come when sent for and in the meantime to keep the peace," etc.

In 1874, forty-four years after the opinion in the Chase case, the question arose again in —

Commonwealth v. *Dowdican's Bail*, 115 Mass. 133.

Compare —

Commonwealth v. *Maloney*, 145 Mass. 205, at 211.

Marks v. *Wentworth*, 199 Mass. 44, 45.

The Attorney General's brief (p. 39) dismisses the case of *Commonwealth* v. *Dowdican's Bail* with this brief comment:

> "in which it is said expressly that the practice 'has been recognized by statute'."

If the two statutes, referred to by Chief Justice GRAY, had been examined, however, it would have appeared that these statutes in no way purported to create the power as to cases in general, but simply regulated the exercise of general power in specific cases, viz., liquor prosecutions. For the convenience of the Court, the first of these statutes is copied here, as follows:

St. 1865, c. 223:

> "SECTION 1. No case in court for the violation of the provisions of the eighty-sixth chapter, or of sections six, seven, eight or nine, of the eighty-seventh chapter of the General Statutes, shall be laid on file or disposed of except by trial, judgment, acquittal or sentence, as the case may be, according to the regular course of proceedings in criminal cases, unless in any case the purposes of justice require other disposition thereof, to be shown upon a written motion setting forth specifically the reasons therefor, and verified by affidavit where facts are relied on; and in such case the motion shall be allowed only upon the certificate of the presiding magistrate or judge, that he is satisfied that the cause relied on exists, and that the interests of public justice require the allowance thereof, which certificate shall be filed in the case.
>
> "SECTION 2. It shall be the duty of the judges,

by a frequent examination of the dockets of their several courts, to see that the provisions of this act are strictly complied with.

"SECTION 3. Nothing in this act shall be construed to affect in any way the course of proceedings where exceptions are pending."

The other reference of the chief justice is to the same statute, reappearing in the revision of the liquor laws. See section 60, c. 415, of 1869.

Certainly the reference to these statutes cannot be used to support the argument that the power depended upon specific statutory provision.

It may therefore be considered as reasonably established in the common law of Massachusetts that the power to suspend judgment existed. And the decisions of Chief Justice SHAW and Chief Justice GRAY must go far toward convincing any Court that it exists throughout the common-law jurisdictions of this country.

IX. Consequences of a Decision against the Practice.

(A) A decision that it is unconstitutional will prevent parole and probation laws.

(B) A decision that it must be authorized by statute may or may not bring such a statute.

If it does not, it will stop parole and probation.

If it does, it will be a point decided merely to be changed by statute.

(C) A decision that it has been unlawful will bring on what we may fairly call a day of judgment. All over the United States men living honestly — law-abiding, reformed citizens — will be brought into court for

sentence. In Massachusetts, for instance, we estimate that perhaps two hundred men and boys now out on good behavior will be haled into court.

X.

Conclusion.

To a certain extent we have followed the learned Attorney General in citing old cases and ancient precedents. But we have tried not to forget, and we venture to remind the Department of Justice that some of these decisions were made when thousands were being hanged for trifling thefts and offenses. In most of the cases where offenders were intelligent enough to create sympathy the law of benefit of clergy then gave it with a too willing hand. However important it may be that such precedents should be consulted, and however valuable they may prove as blazes upon the trail which leads to modern American justice, in the end our criminal law should grow, and grow healthily, into a modern and effectual power for better things. It will not do, when we deal with the human soul lodged in an erring body which has stolen 50 cents' worth of interstate brass, to say that such precedents establish that a further parole statute will be necessary, and meanwhile Courts must conform to a Procrustes standard of statute law untempered by Anglo-Saxon customs.

Extreme cases of the abuse of judicial power can of course be put. They may be as extreme as recent notorious abuse of the pardoning power, but, so long as judges are trusted with the tremendous power of imposing sentences, the mere putting of extreme examples should not be suffered to destroy reasonable and helpful use of it.

Probation before sentence has become a part of our institutions. It is a necessary and a worthy part. In the

administration of justice it helps to reform, it helps to deter, and it helps to educate those against whom criminal process is directed. As a modern and valuable idea it has arisen out of practice and customs, not out of statutes or pieces of paper. It is serving the community well to-day. And the only logical reason given for tearing down the structure so far built up, to begin anew with a statute, is the theory that the letter of the law might secure a greater uniformity throughout the country. But surely that is the letter which killeth.[1]

Respectfully submitted,

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[1] We add the following American citations upon the common-law power of Courts of record to hold to good behavior:

In *Com.* v. *Duane*, 1 Binney, 98, note, TILGHMAN, C.J., said:

"Surety for good behavior may be considered in two points of view. It is either required after conviction of some indictable offense, in which case it forms part of the judgment of the Court and is founded on a power incident to courts of record by the common law, or it is demanded by judges or justices of the peace out of court, before the trial . . . in pursuance of authority derived from a Statute made in the 34th year of Edward 3."

The report of this case in —

1 Hall's American Law Journal and Miscellaneous Repertory, 168 —

must have given it wide currency. Hall's was the first American law journal and this the second number.

In *Estes* v. *State*, 2 Humphreys (Tenn.), 496, 498, it is said:

"Binding to the good behavior was a discretionary judgment, at the common law, after a conviction for a gross misdemeanor, before the passage of the statute of 34 Edward 3" —

and it is held that that is the law of Tennessee.

In *United States* v. *Greener*, 4 Phila. 396, 403, security for good behavior was required before trial in a case of treason.